UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1830EA

Jim C, individually and as parent and next friend of J.C., and Susan C, individually and as parent and next friend of J.C.,	*	
Appellees,	*	
v.	*	
United States of America,	*	On Appeal from the United States District Court for the Eastern District of Arkansas.
Intervenor on Appeal,	*	
Atkins School District, and Arch Ford Education Service Cooperative,	*	
Defendants,	*	
Arkansas Department of Education,	*	
Appellant.	*	

Submitted: January 14, 2000
Filed: December 22, 2000

Before WOLLMAN, Chief Judge, McMILLIAN, RICHARD S. ARNOLD, BOWMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, and BYE, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge, joined by WOLLMAN, Chief Judge, and McMILLIAN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

Plaintiffs, parents of a child with autism, brought this suit against the defendant, the Arkansas Department of Education. They alleged that the defendant had failed to comply with its obligations under certain statutes, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The defendant moved to dismiss the suit, asserting sovereign immunity, as recognized by the Eleventh Amendment. The District Court[1] denied the motion, holding that the abrogation provision of Section 504, 42 U.S.C. § 2000d-7(a)(1), was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. On appeal, a panel of this Court reversed, holding that Section 504 could not be upheld as Section 5 legislation. Bradley v. Arkansas Department of Education, 189 F.3d 745, 756 (8th Cir. 1999). The panel then considered whether Arkansas had waived its sovereign immunity with respect to Section 504 by accepting federal funds. The panel held that there was no waiver, concluding that Section 504 was not a valid exercise of Congress's spending power because the conditions it placed on a State's receipt of federal funds were too broad and therefore coercive. Id. at 758. We granted plaintiffs' suggestion for rehearing en banc on the spending-

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[1] The Hon. Garnett Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

power issue alone, vacating that portion of the panel's opinion and judgment. We hold that Section 504 is a valid exercise of Congress's spending power, and that Arkansas waived its immunity with respect to Section 504 suits by accepting federal funds. The judgment of the District Court, denying the State's motion to dismiss, will therefore be affirmed.

Section 504 of the Rehabilitation Act prohibits "any program or activity" that receives federal financial assistance from discriminating against a qualified individual with a disability. 29 U.S.C. § 794(a). The statute, in relevant part, defines "program or activity" as:

> all of the operations of --
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> . . . .
>
> any part of which is extended Federal financial assistance.

29 U.S.C. § 794(b). Under this definition, the State itself as a whole is not a program or activity. Rather, as we have previously noted, "only the department or agency which receives [or distributes] the aid is covered." Klinger v. Dep't of Corrections, 107 F.3d 609, 615 (8th Cir. 1997) (quoting S. Rep. No. 100-64, 100th Cong., 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. (Legislative History) 3, 6.[2] The

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[2] Klinger dealt with Title IX's definition of "program or activity," 20 U.S.C. § 1687, which is identical to the definition in Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(b). Both Title IX and Section 504

acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole.[3]

The Rehabilitation Act requires States that accept federal funds to waive their Eleventh Amendment immunity to suits brought in federal court for violations of Section 504. 42 U.S.C. § 2000d-7. Since Section 504 covers only the individual agency or department that accepts or distributes federal funds, this waiver requirement is limited in the same way. By accepting funds offered to an agency, the State waives its immunity only with regard to the individual agency that receives them. A State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others. The State is accordingly not required to renounce all federal funding to shield chosen state agencies from compliance with Section 504.

The defendant argues that Section 504's waiver requirement exceeds Congress's spending power by placing overly broad and therefore coercive conditions on federal funds. We disagree. Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal

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were amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), to add this definition of "program or activity."

[3] If the entire state government were subject to Section 504 whenever any of its parts received federal funds, then subsection (b)(1)(B) would be superfluous; both the distributing and receiving state entities would be already covered under (b)(1)(A) whenever either received federal funds. Other circuits interpreting this definition of "program or activity" have come to the same conclusion. Lightbourn v. County of El Paso, Texas, 118 F.3d 421, 427 (5th Cir. 1997); Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991).

funds . . .." South Dakota v. Dole, 483 U.S. 203, 206 (1987). Specifically, Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219, 2231 (1999). While it appears, as the defendant urges, that the "financial inducements" employed by Congress can become so "coercive as to cross the point where 'pressure turns into compulsion,'" that limit has not been crossed here. Id. (citations omitted).

To avoid the effect of Section 504 on the Arkansas Department of Education, the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary quid pro quo that the Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities. See, e.g., Lau v. Nichols, 414 U.S. 563, 566-67 (1974) (upholding Congress's power to condition federal education funds on non-discrimination in the funded programs). In these cases, the Court has found no coercive interference with state sovereignty because the State could follow the "'simple expedient' of not yielding. . .." State of Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 143-44 (1947). Likewise here, the Arkansas Department of Education can avoid the requirements of Section 504 simply by declining federal education funds. The sacrifice of all federal education funds, approximately $250 million or 12 per cent. of the annual state education budget according to the 1999-2001 Biennial Budget, 28-29, would be politically painful, but we cannot say that it compels Arkansas's choice. Cf. New York v. United States, 505 U.S. 144, 168 (1992) ("By [employing the spending power to attach conditions on the States' receipt of federal funding], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the

ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.") The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice.

With regard to the requirements of Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985), the Rehabilitation Act's waiver provision, 42 U.S.C. § 2000d-7(a)(1), provides a clear expression of Congress's "intent to condition participation in the program[] . . . on a State's consent to waive its constitutional immunity." See Lane v. Pena, 116 S. Ct. 2092, 2100 (1996); Little Rock School District v. Mauney, 183 F.3d 816, 831 (8th Cir. 1999). We hold, therefore, that Arkansas waived sovereign immunity, with respect to suits under Section 504 against the Department of Education, when it chose to participate in the federal spending program created by that Section.

The panel opinion took the position that the waiver required would cover all activities of the State, not just the activities of the department or departments receiving federal funds. As a matter of statutory interpretation, we disagree: for reasons we have given, Section 504's definition of "program or activity" is not that broad. We acknowledge that the waiver does cover all activities of the Department of Education, and not merely those activities specifically supported by Section 504 funds. We do not consider such a choice unconstitutionally "coercive." The State may take the money or leave it. Other than the vacated panel opinion in this case, we know of no authority holding any choice so coercive as to exceed the limits of the Spending Clause. Sovereign states are fully competent to make their own choice.

The judgment is affirmed.

BOWMAN, Circuit Judge, dissenting, joined by BEAM, LOKEN, and BYE, Circuit Judges.

I respectfully disagree with the Court's decision. I do so for two separate, independent reasons, either of which, in my view, requires reversal of the District Court. I state them briefly.

First, the financial inducement offered by Congress for the Arkansas Department of Education to waive its Eleventh Amendment immunity with respect to Rehabilitation Act claims is coercive. The Supreme Court explicitly has recognized that financial pressure applied by Congress may "pass the point at which 'pressure turns into compulsion.'" South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). In Dole, the Court rejected the argument as to coercion on the ground that South Dakota would lose only 5% of its federal money for highways if South Dakota declined to raise the minimum drinking age to twenty-one as Congress wished. Inasmuch as the condition imposed by Congress placed only a small percentage of the state's federal money for highways at risk, "the argument as to coercion is shown to be more rhetoric than fact." Id.

In contrast, here we confront a Congressional directive that places at risk 100% of Arkansas's federal funding for education—some $250,000,000 a year at last report. This amount of money to support public education could not easily be replaced by Arkansas, and public education undoubtedly would suffer if Arkansas failed to yield the requested waiver of its Eleventh Amendment immunity. The money would have to be shifted from other needy portions of Arkansas's budget or raised by the imposition of additional taxes. Either course assuredly would present great difficulty. And either way, federal taxpayers in Arkansas would be deprived of the benefits of a return from the federal government to the state of a significant amount of the federal tax monies collected from Arkansas. Moreover, we should not be unmindful of how unpopular and potentially counter-productive it is to increase

state taxes when federal taxes (especially when taken in combination with existing state and local taxes) are at a very high level, as they currently are and have been for many years.[1] In sum, the proportion of federal funds for education in Arkansas here placed at risk by the federal scheme (100%), the amount of those funds (some $250,000,000), and the difficulty of making up for the loss of those funds if the State elects not to waive its Eleventh Amendment immunity with respect to Rehabilitation Act claims all lead to the conclusion that pressure has turned into compulsion and that the waiver given by the State is therefore unenforceable.

Second, as our Court held in a portion of the panel opinion not affected by the en banc proceedings in this case, § 504 of the Rehabilitation Act and its related abrogation clause do not abrogate the states' Eleventh Amendment immunity. That is so because the Rehabilitation Act imposes duties upon the states exceeding those commanded by the Fourteenth Amendment, and thus is beyond the power over the states given to Congress by § 5 of that amendment. For the panel's complete analysis of this point, see Bradley v. Arkansas Department of Education, 189 F.3d 745, 754-56 (8th Cir. 1999). The question then becomes whether Congress, in the guise of Spending Clause legislation, can achieve indirectly what it cannot constitutionally achieve directly. That is, can Congress get its way by presenting the states with the Hobson's choice of either waiving their Eleventh Amendment immunity from § 504 claims or foregoing all federal funds to support various traditional state activities such as education, highways, and the like? Professor Lynn A. Baker has brilliantly captured the essence of this question:

> So long as [Article I, which enumerates all the powers granted to Congress by the original Constitution] is not

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[1] For a scholarly explication of this point, see Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1935-39 (1995).

> interpreted to grant Congress plenary power to regulate the states directly, the Tenth Amendment's reservation to the states of all powers not delegated to the federal government has content and significance. But if the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of "a federal government of enumerated powers" will have no meaning.

Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1920 (1995) (footnote omitted). As Professor Baker noted, Justice O'Connor has sounded the same theme:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause.

Dole, 483 U.S. at 217 (O'Connor, J., dissenting) (citation omitted) (quoting United States v. Butler, 297 U.S. 1, 78 (1936)).

For the majority of the Court in Dole, the proper way to limit the Spending Clause (besides applying the coercion test) is to require, among other things, that any conditions placed on federal grants to the states be related "to the federal interest in particular national projects or programs." Id. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)). The Court found that this test was satisfied in Dole inasmuch as the condition imposed by Congress (raising the state's drinking age to twenty-one) was

directly related to the federal interest in safe interstate travel, which the Court found to be "one of the main purposes for which [federal] highway funds are expended."[2] Id. at 208.

The kind of finding made in Dole could not plausibly be made in this case. Here, the condition (waiver of Eleventh Amendment immunity with respect to Rehabilitation Act claims) bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education. That purpose, broadly stated, is to improve the overall quality of education. Admittedly, fair, nondiscriminatory treatment for disabled persons is part of the total picture, but it is only a small part. Although it presumably would be permissible for Congress to condition the receipt of any grants it might make specifically for Rehabilitation Act purposes upon a wavier of state immunity from § 504 claims—a normal quid pro quo—it is not permissible to condition the receipt of other, unrelated federal grants for education upon such a waiver. Conditions on the receipt of federal funds always must "bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." New York v. United States, 505 U.S. 144, 167 (1992) (citation omitted). Thus, because the condition imposed in this case is overbroad, going as it does to all federal funds received by the Arkansas Department of Education, no matter what the particular purpose of the funds, the State's waiver of its Eleventh Amendment immunity has not been validly exacted.

For either or both of the reasons outlined above, I would hold that plaintiffs' § 504 claim against the Arkansas Department of Education should be dismissed as barred by the

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[2] Justice O'Connor would have found the condition "not sufficiently related to interstate highway construction" and therefore would have held the condition invalid. Dole, 483 U.S. at 214; see id. at 218.

Eleventh Amendment. Accordingly, I would reverse the decision of the District Court allowing the suit to go forward on this claim.

Over the past several years, the Supreme Court in a series of cases has rigorously applied the constitutional prohibition against Congress's use of its Article I powers as a basis for abrogating the Eleventh Amendment immunity of the states. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that Age Discrimination in Employment Act did not validly abrogate states' eleventh Amendment immunity from individual suits because abrogation exceeded Congress's authority under § 5 of Fourteenth Amendment, and reiterating that no such authority exists under Article I); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that congressional attempt to abrogate states' sovereign immunity from patent infringement claims under Patent and Plant Variety Protection Remedy Clarification Act was invalid exercise of Article I commerce or patent powers and not justified under Fourteenth Amendment § 5 enforcement powers); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that Congress did not abrogate states' Eleventh Amendment immunity from suit under Trademark Remedy Clarification Act because Act identified no property right protected by Fourteenth Amendment, whose § 5 enforcement powers were only possible basis for purported abrogation); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding, in seminal case, that Indian Gaming Regulatory Act could not abrogate states' sovereign immunity as exercise of Congress's power under Indian Commerce Clause because Article I powers could not circumvent Eleventh Amendment restrictions on Article III judicial power).

The Court's holdings in these cases reflect the rock-solid principle that Eleventh Amendment immunity trumps any

exercise of the powers of Congress enumerated in the original Constitution; controlling weight must be given to the provision that became part of the Constitution later in time. I am struck, however, by how easy it would be, if the majority of our Court has decided this case correctly, for Congress to overcome this limitation on its power. By resort to the spending power (another Article I power, by the way), Congress could achieve indirectly the same abrogation of Eleventh Amendment immunity it could not achieve directly. Congress could do this by the simple expedient of coupling an abrogation provision with a provision conditioning the states' receipt of any or all federal funds upon the states' waiver of Eleventh Amendment immunity with respect to whatever sorts of claims Congress might specify. Given the financial and political reality within which state governments struggle to fund their operations adequately, most if not all of the states would yield. The same scenario could unfold with respect to other kinds of conditions on the states' receipt of federal funds, with Congress achieving through the spending power ends it otherwise lacks the constitutional authority to pursue. Truly, the view of the Spending Clause taken by the majority of the Court in today's decision gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." Butler, 297 U.S. at 78. It seems quite clear to me that the Framers never intended the Spending Clause to become an enabling provision for the otherwise unconstitutional exercise of federal power over the states. Yet this is precisely what today's decision ordains. If our Court will not take a hard look at the anomaly created by a "spending power über alles" mentality, perhaps the Supreme Court will.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1830EALR	*	
	*	
Jim C., et al.,	*	
Appellees,	*	Appeal from the United
	*	States District Court for
v.	*	the Eastern District of
Arkansas Department of Education,	*	Arkansas
	*	
	*	
Appellant.	*	

The petition for rehearing en banc filed by appellees Jim C., et al., is granted in part. The issue subject to rehearing is limited to the spending clause issue. The case will be heard for oral argument on Friday, January 14, 2000. Counsel for appellees and counsel for the United States may share the twenty (20) minute argument time allotted per side.

Counsel for appellees should immediately forward 21 copies of their previously-filed briefs and appendices for distribution to the court en banc.

December 21, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1830EALR	*	
	*	
Jim C., et al.,	*	
Appellees,	*	Appeal from the United
	*	States District Court for
v.	*	the Eastern District of
	*	
Arkansas Department of Education,	*	Arkansas
	*	
	*	
Appellant.	*	

ORDER

The petition of the United States of America for rehearing en banc is granted. This grant of rehearing en banc is limited to the spending clause issue raised by the petition. Those portions of the court's August 31, 1999, opinion and judgment covering the spending clause issue are vacated. The remainder of the court's opinion and judgment, including that portion of the opinion and judgment in case No. 98-1010, is unaffected by this order.

The clerk is directed to set this case on the court en banc's calendar for oral argument on Friday, January 14, 2000. The case will be assigned twenty (20) minutes per side.

Counsel should immediately forward twenty-one (21) copies of their previously-filed briefs and appendices for distribution to the court en banc.

December 14, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1010

Thomas Bradley, as Natural Guardian of, and on behalf of David Bradley, a minor; Dianna Bradley, as Natural Guardian of, and on behalf of David Bradley, a minor;	*	
Plaintiffs-Appellees,	*	
United States of America,	*	
Intervenor on Appeal,	*	Appeals from the United States District Court for the Eastern District of Arkansas.
v.	*	
Arkansas Department of Education; Mike Crowley, individually and in his capacity as an employee of the Arkansas Department of Education;	*	
Defendants-Appellants,	*	
Williford School District 39; John Does, 1-10,	*	
Defendants,	*	
Advocacy Services, Inc.,	*	
Amicus Curiae.	*	

No. 98-1830

Jim C, individually and as parent and next friend of J.C.; Susan C, individually and as parent and next friend of J.C.; Plaintiffs-Appellees,	*
United States of America, Intervenor on Appeal,	*
v.	*
Atkins School District; Arch Ford Education Service Cooperative; Defendants,	*
Arkansas Department of Education, Defendant-Appellant.	*

Submitted: September 24, 1998
Filed: August 31, 1999

Before BOWMAN, Chief Judge,[1] LOKEN, and KELLY,[2] Circuit Judges.

BOWMAN, Chief Judge.

In these two cases, consolidated on appeal, Arkansas residents brought suit against the Arkansas Department of Education (ADE) and other defendants, alleging violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1487 (West Supp. 1999); § 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794 (1994); and other provisions of state and federal law. The State of Arkansas, representing the ADE and Mike Crowley, a Bradley defendant and ADE employee, moved the District court in each case to dismiss the actions, claiming the Eleventh Amendment prevented a federal court from exercising jurisdiction over such claims. The District Court denied Arkansas's motions with respect to the IDEA and, in Jim C., § 504 of the RA. The state then filed these interlocutory appeals.

I.

These interlocutory appeals involve exclusively legal issues, so we provide only a brief summary of the facts of each case. In Bradley, Thomas and Dianna Bradley filed suit against the ADE, ADE employee Mike Crowley, the local school district, and other unidentified individual defendants, alleging violations of the IDEA and other state and federal statutes. The

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[1] The Honorable Pasco M. Bowman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999. He has been succeeded by the Honorable Roger L. Wollman.

[2] The Honorable John D. Kelly died on October 21, 1998. The case has been decided by the remaining members of the panel pursuant to 28 U.S.C. § 46(d) (1994) and 8th Cir. R. 47E.

Bradleys' IDEA claim asserts that the ADE, Crowley, and the local school district failed to provide an adequate due process hearing under the IDEA to review their son David's Individual Education Program (IEP).[3]

Representing the ADE and Crowley, Arkansas moved for dismissal or in the alternative for summary judgment on a number of grounds. One argument Arkansas raised is that the Eleventh Amendment bars a federal court from exercising jurisdiction over the Bradleys' IDEA claim.

The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas, denied the state's motion. Judge Moody concluded that the IDEA was a valid exercise of Congress's power under § 5 of the Fourteenth Amendment to enforce the Equal Protection Clause, and that the IDEA's provisions abrogating the state's Eleventh Amendment immunity therefore were valid under Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). See Bradley v. Arkansas Dep't of Educ., No. LR-C-96-1004, slip op. at 4 (E.D. Ark. Nov. 21, 1997) (order denying motion to dismiss or for summary judgment). Arkansas appealed the denial of its motion to dismiss the Bradleys' IDEA claim on Eleventh Amendment grounds, and Judge Moody stayed proceedings pending this appeal.

In Jim C., Jim and Susan C. filed suit against the ADE, Arch Ford Education Services Cooperative, and the local school district, alleging violations of the IDEA, § 504 of the RA, 42 U.S.C. § 1983 (1994), and state law. In particular, Jim and Susan C. claimed that their child, J.C., should receive additional treatment consistent with the Lovaas program, a

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[3] An IEP is a written statement that indicates the educational performance level of a child with a disability and the special and mainstream services that will be used to accommodate the child and ensure that the child receives an appropriate education. See 20 U.S.C.A. §§ 1401(11), 1414(d) (West Supp. 1999).

methodology found to have some success in treating children with autism. See Jim C. v. Atkins Sch. Dist., No. LR-C-96-748, slip op. at 2 (E.D. Ark. Feb. 23, 1998) (memorandum opinion and order). Representing the ADE, Arkansas moved for dismissal or in the alternative for summary judgment, asserting in part that the Eleventh Amendment prevented a federal court from exercising jurisdiction over Jim and Susan C.'s IDEA, § 504 and § 1983 claims.

The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas, denied Arkansas's motion to dismiss Jim and Susan C.'s IDEA and § 504 claims. Judge Eisele agreed with Judge Moody's order in Bradley that the abrogation provision in the IDEA was a valid exercise of Congress's § 5 power. See id. at 5-6 (quoting Bradley, LR-C-96-1004, slip op. at 4). Judge Eisele also determined § 504 was a valid exercise of Congress's § 5 power. See id. at 7.[4] Therefore, the District court concluded it had jurisdiction over the IDEA and § 504 claims. Arkansas appealed, and the District Court held in abeyance its ruling on further motions and granted a continuance while the appeal was pending. See id. Arkansas then requested that Jim C. be consolidated with Bradley.

II.

The text of the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment's text, however, does not accurately

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[4] Judge Eisele concluded that the Eleventh Amendment prevents the District Court from exercising jurisdiction over the § 1983 claim Jim and Susan C. brought against the ADE, and therefore dismissed that claim. See Jim C., LR-C-96-748, slip op. at 7. This ruling has not been appealed.

define the bounds of the immunity that the Amendment reflects. See Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (stating that "Eleventh Amendment immunity," while a convenient shorthand, is "something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment"). Rather, Eleventh Amendment immunity generally prevents an unwilling state from being sued in federal court. See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S.Ct. 2199, 2204 (1999) [hereinafter Florida Prepaid]; Seminole Tribe, 517 U.S. at 54; see also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) (saying the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"). The Amendment's protections also may reach to state officials and state agencies, see Hadley v. North Ark. Community Technical College, 76 F.3d 1437, 1438 (8th Cir. 1996) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 n.34 (1984)), cert. denied 519 U.S. 1148 (1997), and to suits brought against a state by citizens of that same state, see Hans v. Louisiana, 134 U.S. 1, 15 (1890); see also Coeur d'Alene, 521 U.S. at 268 (reaffirming Hans). Therefore, the Eleventh Amendment may prevent the plaintiffs in these consolidated cases, all citizens of Arkansas, from proceeding in federal court against the ADE, an Arkansas state agency, and defendant Crowley, an ADE official, for alleged violations of the IDEA and § 504.

Although agreeing that the Eleventh Amendment analysis is appropriate, the plaintiffs and intervenor the United States argue that three exceptions to Arkansas's Eleventh Amendment immunity allow the plaintiffs to proceed with their claims in federal court. First, the plaintiffs assert that Congress, exercising the power granted it by § 5 of the Fourteenth Amendment, abrogated the states' immunity and forced unwilling states to defend themselves in federal court against claims brought for violating the IDEA and § 504.

Second, they argue that Arkansas waived its Eleventh Amendment immunity because it received federal funds appropriated with the conditions imposed by the IDEA and § 504, and that one of the conditions imposed was that a state consent to defend itself in federal court against claims arising under those statutes. Finally, the Bradleys contend that, even if Arkansas is shielded by its Eleventh Amendment immunity, defendant Crowley nevertheless may be enjoined from engaging in future conduct that is contrary to federal law.

III.

Turning first to the plaintiffs' arguments that federal courts have jurisdiction over IDEA claims brought against the ADE and, in Bradley, defendant Crowley, we note that this Court recently has considered whether a state may be sued in federal court for alleged violations of the IDEA. In that decision, Little Rock School District v. Mauney, No. 98-1721, 1999 WL407763 (8th Cir. Jun. 14, 1999), we allowed private citizens' claims that the ADE had violated the IDEA to proceed in federal court on two independent grounds, either of which was a sufficient basis for rejecting the ADE's claim of Eleventh Amendment immunity: (1) that the IDEA abrogated the states' immunity and that the abrogation was effective because Congress exercised its power under § 5 of the Fourteenth Amendment when enacting the IDEA; and (2) that Congress created a valid spending program when it enacted the IDEA, and that Arkansas waived its immunity when it participated in IDEA programs, accepting funds appropriated pursuant to the IDEA and governed by the conditions imposed by the IDEA. See id. at *11-*12.

After our opinion in Mauney was filed, however, the Supreme Court announced a trilogy of Eleventh Amendment cases, Alden, Florida Prepaid, and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S.Ct. 2219 (1999) [hereinafter College Savings]. This Court then announced its en banc decision in Alsbrook v. City of

Maumelle, No. 97-1825, 1999 WL 521709 (8th Cir. Jul. 23, 1999) (en banc). Looking at these more recent authorities, we conclude that Florida Prepaid and Alsbrook undercut Mauney's abrogation analysis. Therefore, we reexamine the question whether a private citizen's suit for a violation of the IDEA may be brought against an unwilling state in federal court.

A.

To determine whether the IDEA abrogates the states' immunity, we begin, as Mauney and the subsequent decisions of this Court and the Supreme Court do, with the two-part Seminole Tribe test. See, e.g., Florida Prepaid, 119 S.Ct. at 2205; Alsbrook, 1999 WL 521709, at *4; Mauney, 1999 WL 407763, at *3. The first part of the Seminole Tribe test requires that a federal statute contain an "unequivocal expression" of Congress's intent to abrogate the states' immunity. See Seminole Tribe, 517 U.S. at 55. The IDEA contains an abrogation provision, 20 U.S.C. § 1403, which reads in part: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." 20 U.S.C.A. § 1403(a) (West Supp. 1999). In Mauney, a panel of this Court stated that the IDEA abrogation provision satisfies the first part of the Seminole Tribe test. See Mauney, 1999 WL 407763, at *4. The subsequent decisions of this Court and the Supreme Court do not undermine this part of Mauney: both Florida Prepaid and Alsbrook conclude that abrogation provisions that essentially mirror § 1403 satisfy the first part of the Seminole Tribe test. See Florida Prepaid, 119 S.Ct. at 2205 (stating the abrogation provision in the Patent and Plant Variety Protection Act, 35 U.S.C. § 296(a), satisfies the first part of the Seminole Tribe test); Alsbrook, 1999 WL 521709, at *4 (concluding the abrogation provision in the Americans with Disabilities Act, 42 U.S.C. § 12202 (1994), unequivocally expresses Congress's intent to abrogate the states' immunity). After examining these authorities, we believe Mauney's

determination that § 1403 offers an unequivocal expression of Congress's intent to abrogate the states' immunity remains correct.

The second part of the Seminole Tribe test requires that a statute be an appropriate exercise of Congress's constitutional powers for its abrogation provision to have effect. See Seminole Tribe, 517 U.S. at 55. The Supreme Court and this Court have recognized only one constitutional power under which Congress may abrogate the states' Eleventh Amendment immunity, the power granted Congress by § 5 of the Fourteenth Amendment. See Florida Prepaid, 119 S. Ct. at 2205-06; Alsbrook, 1999 WL 521709, at *4. Section 5 empowers Congress to "enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment, including the Equal Protection Clause. See U.S. Const. amend. XIV, § 5; see also U.S. Const. amend. XIV, § 1 (containing the Equal Protection Clause, which commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws").

Legislation is an appropriate exercise of Congress's § 5 power only when it is preventative or remedial. See City of Boerne v. Flores, 521 U.S. 507, 530 (1997). For legislation to be preventative or remedial, Congress must "identify the conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Florida Prepaid, 119 S. Ct. at 2207.

Because the briefs in this case were submitted prior to the Court's decision in Florida Prepaid, the parties did no pinpoint the constitutional transgressions Congress sought to remedy when it enacted the IDEA. "[G]uided by the principle that the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects,'" id., (quoting Boerne, 521 U.S. at 525), we have reviewed the legislative history and believe that Congress did not adequately identify the constitutional transgressions it sought to remedy when it

enacted the IDEA. Congress did identify significant disparities in the treatment of students with disabilities and those without disabilities, and made six relevant findings regarding these differences:

> (1) there are more than eight million children with disabilities in the United States today;
> (2) the special educational needs of such children are not being fully met;
> (3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
> (4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
> (5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected; [and]
> (6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

20 U.S.C. § 1400(b)(1)-(6) (1994); see also Board of Educ. v. Rowley, 458 U.S. 176, 189 (1982) (discussing these congressional findings); Mauney, 1999 WL 407763, at *6 (same).

In making these six findings, however, Congress did not find that the disparate treatment of students with disabilities resulted from action by the state or, if it did, that such state action violated the Equal Protection Clause. Florida Prepaid requires that congress find that the states themselves are transgressing the constitution. See Florida Prepaid, 119 S. Ct.

at 2207 (stating that, when Congress enacted the patent infringement legislation at issue in that case, "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"). Congress did not purport to find that the disparate treatment of students with disabilities resulted form state action in violation of the Constitution, which requires states only to have a rational basis to justify treating students with disabilities differently from those without disabilities. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445-46 (1985). Moreover, Congress did not indicate whether the states were treating students differently, or whether local school districts were responsible for the lack of education for disabled children that Congress sought to remedy when it enacted the IDEA.

Whether Congress correctly identified the constitutional transgressions it sought to remedy, however, is not decisive in this case. Even if we assume Congress adequately identified perceived constitutional transgressions it sought to remedy when it enacted the IDEA, Alsbrook requires us to conclude that the IDEA's abrogation provision is invalid because the IDEA is not an appropriate exercise of Congress's § 5 power. The same difficulty that this Court found with the ADA in Alsbrook applies to the IDEA in the present case. Like the ADA, the IDEA "does far more than enforce the rational relationship standard recognized by the Supreme Court in Cleburne." Alsbrook, 1999 WL 521709, at *6 (discussing the ADA). In many instances, programs rationally related to a legitimate state interest - and thus constitutional under Cleburne -- would be struck down as failing to satisfy the IDEA's requirement that students with disabilities receive a "free appropriate public education." 20 U.S.C. § 1400(c) (1994); cf. Alsbrook, 1999 WL 521709, at *6 (stating that, for the same reason, the ADA exceeds Congress's § 5 power). The Constitution would not, for example, require a local school district to provide the nursing care that the Supreme Court in Cedar Rapids Community School District v. Garrett F. ex rel.

Charlene F., 119 S. Ct. 992 (1999), determined the IDEA requires.

Although this Court in Mauney determined that the IDEA had the requisite congruence and proportionality to Congress's goal of providing equal educational opportunity for students with disabilities, see Mauney, 1999 WL 407763, at *11, we now must conclude that the IDEA extends beyond the power granted Congress by § 5 of the Fourteenth Amendment. The IDEA, therefore, cannot be an appropriate exercise of Congress's § 5 power, and its abrogation provision is not valid. See Alsbrook, 1999 WL 521709, at *5 (stating that, if legislation seeks to "expand, enhance, or add to the guarantees of the Fourteenth Amendment," that legislation's abrogation provision is invalid). The abrogation portion of Mauney has been undercut by subsequent events that have changed the legal landscape, and we believe that this portion of Mauney no longer represents current law.

B.

In addition to its abrogation holding, Mauney holds that Arkansas waived its Eleventh Amendment immunity by receiving funds appropriated under the IDEA. See Mauney, 1999 WL 407763, at *11. The Supreme Court's recent decisions add to the Court's waiver jurisprudence, see, e.g., College Savings, 119 S. Ct. at 2228 (rejecting the concept of constructive waiver), but these decisions do not affect Mauney's analysis of the waiver issue. Rather, the Supreme Court continues to recognize that Congress, if acting within its spending power, may condition a state's participation in a federal spending program on the state's waiving its Eleventh Amendment immunity to claims arising from that program. See College Savings, 119 S. Ct. at 2231; see also Alden, 119 S. Ct. at 2267. The waiver portion of Mauney has not been undercut by subsequent decisions. Thus this portion of

Mauney represents the law of the Circuit and we are bound by it.[5]

For a federal statute to produce a waiver of a state's immunity through the state's participation in a federal spending program, the statute must provide a clear expression of Congress's "intent to condition participation in the program[] . . . on a State's consent to waive its constitutional immunity." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985).[6] This Court noted in Mauney that there has been some unease in finding that § 1403, the IDEA's abrogation provision, satisfies this requirement, because § 1403 is entitled "Abrogation of state sovereign immunity" and does not mention waiver. See Mauney, 1999 WL 407763, at *11. Although § 1403 has some shortcomings that limit its use as a clear expression of Congress's intent to condition a receipt of IDEA funds on a state's waiving its immunity, another provision of the IDEA reinforces the warning contained in § 1403. That provision, IDEA § 1415, requires states to provide certain procedures for parents who wish to challenge a state's implementation of the "free appropriate public education" standard. See 20 U.S.C.A. § 1415(a) (West Supp. 1999). One of the procedures that must be provided is the opportunity to have IDEA decisions reviewed in federal court. See 20 U.S.C.A. § 1415(i)(2) (West Supp. 1999) (stating that

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[5] For the record, we would have reached the same conclusion regarding waiver even if we had decided the present case in advance of Mauney.

[6] In Part IV.B of this opinion, we identify three requirements a federal appropriations statute must satisfy before a state's participation in that spending program causes the state to waive its Eleventh Amendment immunity to suits arising from such participation. We do not analyze all three elements here because this Court already has determined in Mauney that Arkansas waived its immunity to suits arising under the IDEA by receiving IDEA funds, and because Arkansas conceded during oral argument that the IDEA was a valid exercise of Congress's spending power and that the state received funds under the IDEA.

parties who are aggrieved by a decision under that IDEA may file an action in a federal district court); see also 20 U.S.C.A. § 1415(i)(3)(A) (West Supp. 1999) (stating that "district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy"). When it enacted §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a state's participation in the IDEA program and its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA. We therefore hold in accordance with Mauney that Arkansas waived its Eleventh Amendment immunity with respect to IDEA claims when it chose to participate in the federal spending program created by the IDEA.

C.

The Bradleys argue that, even if the ADE could not be sued in federal court, Ex parte Young, 209 U.S. 123 (1908), allows them to seek to enjoin ADE officials, including defendant Crowley, from committing violations of federal law. We agree. Ex parte Young permits a private party to receive prospective injunctive relief in federal court against a state official, even if the Eleventh Amendment otherwise protects the state and its officials from being sued in federal court. See Ex parte Young, 209 U.S. at 155-56, 159, 166-68 (allowing a federal court to ignore a state's Eleventh Amendment immunity and impose prospective injunctive relief on state officials to enjoin a future violation of federal law); see also Missouri v. Jenkins, 491 U.S. 274, 279 (1989) (stating that a state's Eleventh Amendment immunity does not prevent "an award of attorney's fees ancillary to a grant of prospective relief" pursued under Ex parte Young).[7]

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[7] The Bradleys make no claim for compensatory or punitive damages, damages not being available for violations of the IDEA. See, e.g., Thompson v. Board of Special Sch. Dist. No.1, 144 F.3d 574, 579 (8th

Furthermore, even if Ex parte Young did not apply, the Bradleys could pursue any remedies available under the IDEA against Crowley because, when Arkansas waived its own Eleventh Amendment immunity with respect to IDEA claims, it also waived any Eleventh Amendment immunity Crowley might have had as a state official with respect to such claims. "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment." Kentucky v. Graham, 473 U.S. 159, 167 (1985). Under Graham, when Arkansas waived its own Eleventh Amendment immunity from suits brought under the IDEA, the state also waived the Eleventh Amendment immunity of its officials from such suits. See Duffy v. Riveland, 98 F.3d 447, 452, n.4 (9th Cir. 1996). The District Court, therefore, may exercise jurisdiction over the Bradleys' IDEA claims against Crowley and may provide any relief that the IDEA authorizes.

IV.

Next, we turn to Arkansas's contention that the Eleventh Amendment prevents the states from being forced to litigate in federal court claims arising under § 504 of the Rehabilitation Act. Section 504 states in part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1994). Arkansas concedes that the ADE receives federal funds, and apparently the state does not dispute that § 504 prohibits the ADE from discriminating on

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Cir. 1998); Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996).

the basis of disability. The state does assert that the Eleventh Amendment bars federal courts from exercising judicial power over the state with respect to claims brought under § 504. Therefore, we apply the same analysis that we applied to the IDEA in Parts III.A and III.B of this opinion to determine whether Jim and Susan C. may pursue their § 504 claim against the ADE in federal court.

A.

To determine whether § 504 abrogates the states' Eleventh Amendment immunity, we again engage in Seminole Tribe's two-part analysis. First, the statute must contain an unequivocal expression of Congress's intent to abrogate the states' Eleventh Amendment immunity. In 1985, the court in Atascadero held that § 504 lacked the required expression of intent. See 473 U.S. at 247. Congress responded by enacting an abrogation provision, now codified as 42 U.S.C. § 2000d-7 (1994). See Lane v. Pena, 518 U.S. 187, 198 (1996) (discussing the legislative history of § 2000d-7). This abrogation provision states:

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both a law and in equity) are available for such a violation to the same extent as such remedies are

> available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a) (1994) (internal citations omitted). This Court already has concluded in Alsbrook and Mauney that abrogation provisions mirroring 42 U.S.C. § 2000d-7 adequately express Congress's intent to abrogate. See Alsbrook, 1999 WL 521709, at *4 (examining the ADA abrogation provision, codified at 42 U.S.C. § 12202 (1994)); Mauney, 1999 WL 407763, at *11 (examining the IDEA's abrogation provision, 20 U.S.C. § 1403). Because we find no material differences between § 2000d-7 and the abrogation provisions considered and found adequate in Alsbrook and Mauney, we conclude that § 504 also satisfies the first part of the Seminole Tribe test.

The second part of the Seminole Tribe test, as discussed supra in Part III.A, requires that a statute be an appropriate exercise of Congress's constitutional powers for the statute's abrogation provision to have effect. See Seminole Tribe, 517 U.S. at 55. The United States, intervening in this litigation, argues that § 504 is a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. Congress did not rely expressly on its § 5 power when it enacted § 504 or its abrogation provision, 42 U.S.C. § 2000d-7. See Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998). But there is no requirement that a statute specifically refer to § 5 of the Fourteenth Amendment for the statute to be a valid exercise of that constitutional power. See EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (stating that Congress need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection' for the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise" (internal quotation and citation omitted)); see also Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822, 830 (8th Cir. 1998). "As long as Congress had such authority as an objective matter, whether it

also had the specific intent to legislate pursuant to that authority is irrelevant." Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997). Therefore, although the legislative history of § 504 does not mention § 5 of the Fourteenth Amendment, we must consider whether Congress has the constitutional power under § 5 of the Fourteenth Amendment to enact § 504. Accordingly, we examine whether Congress adequately identified the constitutional transgressions it sought to remedy, and whether § 504 is properly tailored, with the requisite congruity and proportionality, to remedy those transgressions. See Florida Prepaid, 119 S. Ct. at 2207; Boerne, 512 U.S. at 520.

When we consider the legislative history of § 504 and its abrogation provision, we find little indication that Congress properly identified constitutional transgressions it sought to remedy by enacting § 504. In fact, the legislative history is largely silent regarding the reason § 504 was included in the RA. The Joint Explanatory Statement of the Committee of the Conference, for example, does not mention § 504. See J. Conf. Rep. No. 93-500, reprinted in 1973 U.S.C.C.A.N. 2143; see also Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy 54 (1984) ("It appears that most members of Congress either were unaware that § 504 was included in the act or saw the section as little more than a platitude, a statement of a desired goal with little potential for causing institutional change.") Similarly, the legislative history of the abrogation provision does not identify constitutional transgressions that make such a provision appropriate. The legislative history of § 2000d-7 instead reveals only that Congress sought to override the Supreme Court's decision in Atascadero by providing an unequivocal expression of Congress's intent to abrogate the states' immunity. See e.g., 132 Cong. Rec. S28622-24 (daily ed. Oct. 3, 1986) (statement of Sen. Cranston and attached letter from John R. Bolton, Assistant Attorney General, stating that the purpose of the Civil Rights Remedies Equalization Act is to remedy the

statutory flaw identified in Atascadero). The legislative history apparently lacks any indication of why Congress thought such abrogation was necessary or appropriate.

We again refrain from relying on Congress's failure to identify properly the evil it sought to remedy, however, because this issue was not fully briefed and would not affect the outcome of our analysis. Instead, Alsbrook compels us to conclude that § 504 reaches beyond the scope of Congress's § 5 power. As noted supra in Part III.A, this Court determined in Alsbrook that Title II of the ADA exceeds Congress's § 5 power because the ADA is not merely remedial, but provides substantive rights in excess of those that are protected by the Constitution from impairment by government action. See Alsbrook, 1999 WL 521709, at *6. Alsbrook requires us to reach the same conclusion here, because the ADA and § 504 provide essentially the same protections for the same group of individuals, people with disabilities. See § 29 U.S.C. 794(d) (1994) (directing that courts should use the same standard to determine if § 504 and the sections of the ADA relating to employment have been violated).[8] The only difference between the ADA and § 504 is § 504's application only to recipients of federal funds. See Randolph v. Rogers, 170 F.3d 850, 858 (8th Cir. 1999) ("The ADA and [§ 504 of the] RA are 'similar in substance' and, with the exception of the RA's federal funding requirement, 'cases interpreting either are applicable

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[8] Regulations promulgated under the RA require schools to provide a "free appropriate public education," the same standard imposed by the IDEA. See e.g., 34 C.F.R. § 104.33(a) (1998) (requiring recipients of federal funds that operate public elementary or secondary education programs to provide a free appropriate public education to qualified persons with disabilities). We already have determined that the "free appropriate public education" standard exceeds the constitutional burdens imposed by the Equal Protection Clause. See supra Part III.A. These regulations, therefore, do not save § 504's abrogation provision.

and interchangeable.'") (quoting Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)). This distinction is immaterial to our § 5 analysis.

This Court determined in Alsbrook that the ADA employment provisions were not an appropriate exercise of Congress's § 5 power because the ADA imposes duties upon the states exceeding those commanded by the Fourteenth Amendment. Applying the reasoning of Alsbrook, we conclude that § 504 does not abrogate the states' Eleventh Amendment immunity.[9]

B.

We next consider whether Arkansas waived its Eleventh Amendment immunity with respect to claims arising under § 504 by accepting federal funds. Examining the Supreme Court's decisions in Atascadero and Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), we find three

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[9] In concluding that § 504 does not abrogate the states' immunity, we recognize the existence of decisions ot the contrary by the Fourth, Fifth and Ninth Circuits that predate the Supreme Court's Alden trilogy. See Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212, 222-23 (4th Cir. 1999); Coolbaugh v. Louisana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998). We also are aware of dicta contained in earlier Supreme Court opinions to the effect that § 504 abrogated the states' immunity. See e.g., Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992) (in which the Court, while considering whether Title IX creates an implied right of private action, stated that Congress when enacting 42 U.S.C. § 2000d-7 "abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975"). This sort of dicta, unsupported by Seminole Tribe's abrogation analysis, is probably best read simply as a statement of historical legislative fact rather than as a statement of constitutional law. To give it import as a statement of constitutional law would be to render it out of step with the Court's more recent decisions.

requirements that must be satisfied if a state's participation in a federal spending program is to be held to constitute a waiver of the state's Eleventh Amendment immunity against claims arising under that program. The three requirements are: (1) the federal spending program must represent a valid exercise of Congress's spending power; (2) the statute creating the federal spending program must contain a clear, unambiguous warning that Congress intends to exact waiver of Eleventh Amendment immunity as a condition for participating in the program; and (3) the state must have participated in the federal spending program. See Atascadero, 473 U.S. at 247; Pennhurst 451 U.S. at 17; see also, Abril v. Virginia, 145 F.3d 182, 190-91 (4th Cir. 1998) (formulating a two-factor test to determine if states have waived their immunity).

Section 504 fails the first requirement because it is not a valid exercise of Congress's spending power. College Savings recognizes that Congress may require states to comply with conditions to receive federal funds, including waiving their Eleventh Amendment immunity. See College Savings, 119 S. Ct. at 2231. College Savings warns, however, that "the financial inducements offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." Id. (internal quotations and citations omitted). There are also limitations on the conditions that Congress may impose on a state's receipt of federal funds. One of these limitations is that "conditions must ... bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." New York v. United States, 505 U.S. 144, 167 (1992) (internal citation omitted).

Section 504 and its abrogation provision impose overly broad conditions on state agencies such as the ADE. Section 504 prohibits "any program or activity receiving federal funding" from treating an individual differently "solely by reason of" that person's disabilities. See 29 U.S.C. § 794(a).

"Program or activity" is defined broadly to include "all of the operations" of state departments, agencies, or instrumentalities. See 29 U.S.C. § 794(b)(1)(A). With these provisions, § 504 mandates that Arkansas waive its Eleventh Amendment immunity to all claims arising under § 504 if it receives any federal funding, even funding unrelated to the state's obligations to comply with § 504 or the rest of the RA.

Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce all federal funding, including funding wholly unrelated to the RA, if it does not want to comply with § 504. Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under § 504 or reject funding and retain its Eleventh Amendment immunity to such suits.

The condition § 504 imposes on recipients of federal funds exceeds the ordinary quid pro quo involved in a proper exercise of Congress's spending power. See Pennhurst, 451 U.S. at 17 (stating that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"). Therefore, § 504 is not a valid exercise of Congress's spending power, and Arkansas by receiving federal funds did not waive its Eleventh Amendment immunity to suits arising from alleged violations of § 504. We reverse the District Court's order in Jim C. to the extent it holds that it may exercise jurisdiction over Jim and Susan C.'s § 504 claim, and remand the case to the District Court for dismissal of the claim on the basis of Arkansas's Eleventh Amendment immunity.

V.

For the reasons stated above, we affirm the orders in 98-1010 and 98-1830 with regard to the IDEA, not on the abrogation grounds upon which those orders relied, but on the grounds that Arkansas waived its Eleventh Amendment immunity with respect to claims arising under the IDEA by voluntarily participating in this federal spending program. We reverse the order in 98-1830 to the extent it rejects Arkansas's assertion of Eleventh Amendment immunity with respect to Jim and Susan C.'s claim that the ADE violated § 504 of the Rehabilitation Act, and remand for dismissal of the plaintiffs' § 504 claim on the basis of the state's Eleventh Amendment immunity. Both cases are remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JIM AND SUSAN C., individually and as parents and next friends of J.C. PLAINTIFFS

VS. LR-C-96-748

ATKINS SCHOOL DISTRICT, ARCH FORD EDUCATION SERVICE COOPERATIVE, and ARKANSAS DEPARTMENT OF EDUCATION DEFENDANTS

MEMORANDUM OPINION AND ORDER

Several motions are now pending before the Court in this matter. The Court has decided to address first the threshold issue of whether plaintiffs' Complaint against separate defendant Arkansas Department of Education ("ADE") is barred by the Eleventh Amendment to the United States Constitution. After a review of the parties' submissions, and for the reasons set forth in this Memorandum Opinion, the Court will grant in part and deny in part ADE's motion to dismiss based upon Eleventh Amendment immunity. However, the Court will hold in abeyance ADE's motion to dismiss and motion for summary judgment as to the remaining claims against it. The Court will further hold in abeyance plaintiffs' pending motions for summary judgment. Further, the Court will grant a continuance in this matter and will issue an Amended Scheduling Order in the near future.

I. BACKGROUND

A. General Background

Plaintiffs bring their Amended Complaint and Application for Injunctive Relief pursuant to 42 U.S.C. § 1983, the

Rehabilitation Act of 1973 (the "RA"),[1] the Individuals with Disabilities Education Act (the "IDEA"),[2] and the Fourteenth Amendment, Plaintiffs, who are husband and wife, contend that their child J.C. was diagnosed in November 1994 as having autism and is therefore a child with disabilities as defined in 20 U.S.C. § 1410(a)(1). Plaintiff was, at times relevant to this action and presently, a student in the Atkins School District. When J.C.'s first Individualized Educational Plan ("IEP") was drafted, his parents requested an intervention program called the Lovaas program ("Lovaas"). Plaintiffs state that Lovaas requires approximately 40 hours per week of one-on-one training. Plaintiffs further maintain that an IEP was adopted in October 1995, which allowed J.C. 19 hours of Lovaas per week. In January 1996, plaintiffs requested additional services in order to "fully implement ABA/Lovaas with J.C. at 40 hours per week." Amended Complaint ¶ 33. They assert that around February 14, 1996 the "administratively-directed IEP team" ruled out intensive Lovaas intervention, as well as other necessary components of occupational therapy and direct speech and language therapy. A due process hearing with the Arkansas department of Education[3] followed on March 4 and April 4, 1996. Plaintiffs assert that the Hearing Officer improperly assigned burdens of proof and persuasion to J.C.'s parents. Plaintiffs represent that the resulting August 21, 1996 Hearing Officer's Report and Decision found that services provided under J.C.'s initial IEP met the legal standard of appropriateness. Plaintiffs contend that defendants have gone on to violate J.C.'s substantive rights to "extended year summer services."

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[1] 29 U.S.C. § 701, *et seq.*

[2] 20 U.S.C. § 1400, *et seq.*

[3] James M. Ammel, presiding Hearing Officer.

Plaintiffs assert that defendants "have violated J.C.'s substantive rights under IDEA and Section 504 of the Rehabilitation Act by failing to offer an appropriate educational program." *Id.* ¶ 8. They maintain that all defendants have acted under color of state law to discriminate against plaintiffs' pursuit of a free appropriate education under the IDEA. Citing 20 U.S.C. § 1415(e)(2), plaintiffs seek appeal and reversal of the Hearing Officer's Decision on both procedural and substantive grounds. They further seek an Order directing ADE to amend J.C.'s IEP to provide specified Lovaas services and other relief constituting an "appropriate free public education." They also seek various forms of damages, and an Order directing defendants to comply with 20 U.S.C. § 1413(a)(3)(A) & (B) and 34 C.F.R. § 300.382 by disseminating certain Lovaas information.

B. Allegations Specific to ADE

Plaintiffs assert that the IDEA expressly charges the State of Arkansas with the duty of establishing "effective procedures for acquiring and disseminating . . . significant information derived from educational research, demonstration, and similar projects." Amended Complaint ¶ 14 (citing 20 U.S.C. § 1413(a)(3)(A)). They further aver that the State is responsible for implementing "effective procedures for . . . adopting, where appropriate, promising educational practices. . . ." *Id.* ¶ 15 (citing 20 U.S.C. § 1413(a)(3)(B)). Plaintiff's allege ADE has failed to satisfy either of these statutory directives, contending that the State has "engaged in an active campaign to frustrate the dissemination and implementation of promising educational research in the area of applied behavior analysis, as practiced intensively—ABA/Lovaas." *Id.* ¶ 16. They assert that "[m]eeting these 'two clear statutory directive[s]' is absolutely foundational to the ability of the Defendants to invoke the Hearing Officer's and/or this court's deference to the Defendant's 'choice' of methodology." *Id.* ¶ 17.

Plaintiffs contend that the State's active campaign to frustrate the dissemination and implementation of promising educational research in the area of Lovaas has caused a substantial risk of irreparable harm to J.C. and all other similarly situated autistic students in Arkansas. *Id.* ¶ 51. Plaintiffs request an Order directing the ADE to take effective, affirmative action, under a specific written plan of activities and timetables to comply with 20 U.S.C. § 1413(a)(3)(A) and (B), and 34 C.F.R. § 300.382 by disseminating significant information derived from the educational research of O. Ivar Lovaas, the U.S. Department of Education Lovaas demonstration grant project of Montgomery County, Maryland, and similar projects of ABA practitioners using intensive applied behavior analysis. They further request an Order directing the ADE to adopt promising educational practices for autistic children in Arkansas.

ADE first argues that the Court lacks subject matter jurisdiction because the Eleventh Amendment bars claims against ADE under state law, § 1983, the RA and the IDEA. Second, ADE contends that plaintiffs fail to state a claim upon which relief may be granted. Third, ADE claims that it clearly complied with its mandate under the IDEA and RA, and, therefore, that summary judgment in its behalf is proper. Finally, defendant contends that plaintiffs are not entitled to compensatory damages.

II. DISCUSSION

A. Eleventh Amendment Immunity

The Court must first address the threshold issue of whether it has jurisdiction over the claims brought against the Arkansas Department of Education. Generally, the Eleventh Amendment bars suits against States and their agencies. It does not bar such suits which only seek prospective injunctive relief to prevent future violations of federal law. *Ex Parte Young*, 209 U.S. 123 (1908); *Trevelen v. University of Minnesota*, 73 F.3d

816, 819 (8th Cir. 1996). Furthermore, the Supreme Court has held that Congress may abrogate the States' Eleventh Amendment immunity if it unequivocally expresses its intent to do so. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 114 (1996). Therefore, to the extent that plaintiffs seek only prospective injunctive relief,[4] their suit does not fall within the Eleventh Amendment's prohibition. The Court also concludes that Congress has permissibly abrogated ADE's Eleventh Amendment immunity as to plaintiffs' IDEA and RA claims. However, ADE is entitled to Eleventh Amendment immunity as to plaintiffs' § 1983 claim and any other claim seeking monetary damages under state law.

1. Eleventh Amendment Immunity under the Individuals with Disabilities Education Act

Congress has abrogated immunity under the IDEA.[5] ADE argues that Congress exceeded its power under § 5 of the Fourteenth Amendment because the IDEA is not rationally related to the Fourteenth Amendment's subject matter. Recently in this District, the Honorable James M. Moody was faced with the same issue. *Bradley v. Arkansas Department of Education, et al.*, USDC LR-C-96-1004 (E.D. Ark. 1997), Doc. No. 41. There, he stated:

> If Congress enacted the IDEA pursuant to [a] valid exercise [of] its powers under § 5 of the Fourteenth Amendment, a state does not have Eleventh Amendment immunity. *See Seminole*, 116 S. Ct. at 1125. The Court is not aware of any circuit court decision ruling on this issue. However, a district court has held that Congress enacted the IDEA under a valid exercise of its powers under § 5 of the

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[4] Amended Complaint, Prayer for Relief ¶ (H).

[5] "A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." 20 U.S.C.A. § 1403(A) (West 1997).

> Fourteenth Amendment. *Peter v. Johnson*, 958 F. Supp. 1383, 1394 (D. Minn. 1997). This Court agrees. In enacting the IDEA, Congress found that it is in "the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law." 20 U.S.C. § 1400(b)(9). Thus, the Court finds that *the IDEA was enacted pursuant to Congress' authority under § 5 of the Fourteenth Amendment and effectively abrogates immunity under the Eleventh Amendment.*

Id. at 4 (emphasis supplied).

This reasoning is sound. The court is not unmindful that Congress may not constitutionally exceed its enumerated powers. However, after carefully reviewing the parties' submissions, their arguments and the applicable law, the Court is of the opinion that the IDEA was constitutionally enacted to assure equal protection of children with disabilities.[6] Moreover, Congress clearly and unequivocally abrogated the States' Eleventh Amendment immunity under the IDEA. Therefore, ADE is not entitled to Eleventh Amendment immunity as to plaintiffs' IDEA claim.

2. *Eleventh Amendment Immunity under the Rehabilitation Act*

The same analysis applies to a consideration of whether Congress has permissibly abrogated Eleventh Amendment immunity under the Rehabilitation Act.[7] ADE cites several

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[6] *See also Emma v. Eastin*, 1997 WL 781230, at *6 (N.D. Cal. Oct. 17, 1997) (concluding that the IDEA, ADA and RA abrogations were enacted pursuant to Congress' powers under § 5 of the Fourteenth Amendment, and thus were valid exercises of power).

[7] 42 U.S.C. § 2000d-7 provides that "[a] State shall not be immune under the Eleventh Amendment . . . for a violation of section 504 of the

prison cases as support for its position that Congress exceeded its Constitutional power.[8] This Court has previously held that the ADA and RA apply to state correctional facilities. *Herndon v. Johnson*, 970 F. Supp. 703 (E.D. Ark. 1997). In that case, the Court opined that "Congress has spoken on this point and has acted within its power under the Supremacy Clause and the Fourteenth Amendment to upset the states' general freedom to conduct state functions as they desire." *Id.* at 708. This Court subsequently declined another request by the Arkansas Department of Correction to reject Congress' abrogation of the Eleventh Amendment under the Rehabilitation Act in *Moore v. Norris, et al.*, USDC LR-C-97-506 (E.D. Ark. 1997), Doc. No. 51. The Court noted that "the history of the ADA and Section 5 jurisprudence leads the Court to the conclusion that Congress did not invalidly abrogate Eleventh Amendment immunity under the ADA and RA." In sum, this Court has several times upheld Congress' abrogation of Eleventh Amendment immunity under the RA, and the Court will not depart from these prior holdings absent some further guidance from the Eighth Circuit or Supreme Court.

3. Eleventh Amendment Immunity Under Section 1983

Arkansas Department of Education argues that plaintiffs' § 1983 lawsuit against it is barred by the Eleventh Amendment immunity. Plaintiffs have not disputed this argument. A review of the Complaint and Amended Complaint makes it unclear whether plaintiffs are attempting to assert a § 1983 claim directly against ADE. However, absent consent or Congressional abrogation, a private party may not sue a State

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Rehabilitation Act."

[8] *Amos v. Maryland Dept. of Public Safety & Corrections*, ___ F.3d ___, 1997 WL 581652 (4th Cir. 1997); and *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied sub nom. Torcasio v. Angelone*, 116 S. Ct. 772 (1996).

or its agencies seeking damages. *See Alabama v. Pugh*, 98 S. Ct. 3057 (1978); *Nix v. Norman*, 879 429 (8th Cir. 1989). By enacting § 1983, Congress did not abrogate the Eleventh Amendment. *See Quern v. Jordan*, 99 S. Ct. 1139 (1979). Moreover, plaintiffs have not advanced an argument for consent. Therefore, the Court concludes that it does not have subject matter jurisdiction to entertain a § 1983 claim for damages against ADE. Furthermore, recovery of damages against ADE under any other theory of damages (absent some exception to the Eleventh Amendment) will not be allowed in this lawsuit.

B. ADE's Motion to Dismiss and Motion for Summary Judgment

Having decided that ADE is not cloaked with immunity as to the IDEA and RA claims, the Court now faces defendant's motion to dismiss and motion for summary judgment as to those issues. At this point, the Court will hold in abeyance both motions until it can address all pending issues in this matter.

C. Motion for Continuance

In its motion, ADE asserts that "[s]hould the Court deny this motion, ADE is entitled to a continuance and stay of proceedings in this matter pending an interlocutory appeal." Neither party has briefed this issue. However, in light of the Court's rulings herein, the Court will continue this case indefinitely. The Court will enter an Amended Scheduling Order in the near future.

III. CONCLUSION

To recap, the Court has held as follows:

1. ADE does not have Eleventh Amendment immunity for claims brought under the RA and IDEA.

2. ADE does have Eleventh Amendment immunity for claims seeking damages under § 1983 or State law.

3. ADE's motion to dismiss plaintiffs' IDEA and RA claims shall be held in abeyance.

4. ADE's motion for summary judgment as to plaintiffs' IDEA and RA claims shall be held in abeyance.

5. The Court hereby grants an indefinite continuance of the trial date in this matter and will enter an Amended Scheduling Order in the near future.

IT IS THEREFORE ORDERED that Arkansas Department of Education's Motion[9] be, and it is hereby, GRANTED IN PART and DENIED IN PART. The above Conclusion summarizes the Court's holdings.

Dated this 23rd day of February, 1998.

/s/ Garnett Thomas Eisele

UNITED STATES DISTRICT JUDGE

[9] Doc. #35.